NEA LEGAL UPDATES

ADVISORY REGARDING U.S. DEPARTMENT OF EDUCATION'S FEBRUARY 14, 2025 DEAR COLLEAGUE LETTER

This advisory responds to the February 14th Dear Colleague Letter ("Letter") issued by the Office for Civil Rights in the U.S. Department of Education ("Department"), which under the guise of enforcing Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution, impermissibly seeks to interfere with state and local decisions regarding appropriate school and college curriculum, instruction and other programming. Specifically, the Letter expresses the Department's view that racial classifications in education are invariably unlawful as well as the view that efforts to increase diversity, equity and inclusion in education through curricular, instructional and programmatic choices are similarly unlawful. And the Letter serves notice that the Department intends to take "appropriate measures to assess compliance" with the Department's view "beginning no later than" February 27, 2025, presumably by way of compliance reviews by the Office for Civil Rights.[1]

As explained below, the federal government has no authority to intrude upon the decisions of universities, colleges and school districts regarding what is taught, how it is taught, and what educational programming will be provided. Not only do federal education laws prohibit such interference but federal civil rights laws permit such decisions. Curriculum, instruction and programming choices that recognize, celebrate and explore the rich diversity of our country are lawful, valid and necessary to provide educational opportunity and access to all students.

[1] A compliance review is an investigation commenced by the Office of Civil Rights ("OCR") itself rather than in response to a complaint. In the past, such reviews have been focused on securing compliance and usually were resolved via a voluntary resolution agreement. The review itself is the beginning of a process that can result in the loss of federal funds but only after a full administrative hearing.

I. The Department Is Prohibited by Law from Interfering with State and Local Educational Programs, Curriculum, Textbooks and Libraries

Since the Department was established, the law has made clear that it has limited authority to interfere with the instructional choices of states, school districts and colleges and universities. The law that established the Department— the Department of Education Organization Act of 1979—recognizes that "the primary public responsibility for education is reserved to the States and the local school systems, and other instrumentalities of the States," 20 U.S.C. § 3401, expresses Congress' intent to "protect the rights of State and local governments and public and private education institutions in the areas of educational policies," 20 U.S.C. § 3403, and prohibits the Department from "exercis[ing] any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school or school system . . . or over the selection or content of library resources, textbooks or other instructional materials." *Id.*

Subsequent federal education laws have reiterated and reinforced those limits. Most importantly, the prohibition against federal interference is incorporated throughout the Every Student Succeeds Act ("ESSA"), which is the major federal statute under which funding flows to K-12 schools. ESSA prohibits the Department from mandating, directing or controlling through grants or contracts a state, school district or school's "specific instructional content, academic standards and assessments, curricula, or program of instruction." 20 U.S.C. § 7906A. Similar prohibitions against federal interference with school curriculum and programs of instruction are reiterated throughout ESSA. *See*, *e.g.*, 20 U.S.C. § 7907 (general prohibition against the Department mandating, directing, reviewing or controlling a "school's instructional content, curriculum and related activities"); 20 U.S.C. § 6849 (Secretary may not mandate or preclude "the use of a particular curricula or pedagogical approach to educating English learners.").

Similarly, the General Education Procedures Act, which governs the conduct of the Department of Education generally, prohibits the Department from "exercise[ing] any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system or other the selection of library resources, textbooks, or other printed or published instructional materials." 20 U.S.C. § 1232a.

These statutory restrictions prohibit the Department from interfering with state, school district, college and university decisions regarding teaching, instruction, curriculum and similar matters.

II. The February 14th Dear Colleague Letter is Not Supported by Established Law

To be sure, the federal government may enforce federal and constitutional civil rights protections on states and their schools and universities. But the Letter goes far beyond any effort to enforce federal civil rights law prohibitions against race discrimination. The Letter reflects an advocacy position of the administration, which is contrary to law that is binding on the Department.[2] Because a Dear Colleague Letter cannot change the law, and because the Department has no authority to change the law, the threatened actions to investigate recipients of federal funds for compliance with the Department's unfounded views, should be seen for what they are — nothing more than an effort to intimidate and chill lawful speech and association.

The proffered basis for the threats in the Letter is the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. Harvard College*, 600 U.S. 181 (2023), which addressed the validity of higher education admissions processes in which race was used as a factor. That decision, however, does not support the administration's position. The Court's ruling did not address curricular decisions but instead was limited to higher education admissions decisions, *id.* at 213, and it has been applied subsequently to other admissions processes at the K-12 and higher education level to prohibit the use of race-based admissions decisions but to allow facially neutral admissions criteria even when they expand the racial diversity of a student body. *See Boston Parent Coalition for Academic Excellence Corp. v. Boston*, 89 F.4th 46 (1st Cir. 2023) (upholding admissions system giving preference for students residing in lower income zip codes), *cert. denied*, 145 S.Ct. 15 (2024); *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, (4th Cir. 2023) (upholding admissions policy spreading eligible slots across feeder middle schools), *cert. denied*, 218 L. Ed. 2d 71 (2024). Indeed, even *Students for Fair Admissions* recognized that admissions processes could lawfully consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." 600 U.S. at 230.[3]

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[2] As the Letter itself concedes, it "does not have the force and effect of law and does not bind the public or create new legal standards."

[3] Three of the six justices in the majority expressly recognized that universities could lawfully employ valid facially neutral selection criteria to encourage diversity. 600 U.S. at 300 (Gorsuch, J., with Thomas, J., concurring) (noting that "Harvard could nearly replicate [its] current racial composition without resorting to race-based practices" if it increased tips for "socioeconomically disadvantaged applicants" and eliminated tips for "children of donors, alumni, and faculty"); *id.* at 280 (Thomas, J., concurring) ("If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university

To the extent *Students for Fair Admissions* says anything relevant to the broader educational context, the message is that racial classifications in education that divide educational opportunities based on race are subject to strict scrutiny and therefore are rarely permissible. But all of the following educational policies and programs employ no such racial classifications and are permitted.

> -Curriculum, instruction and courses that addresses issues of race and racism;
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> -Programming including celebrations that recognize the contributions and experiences of individuals of different races such as Black History Month and Hispanic Heritage Month;
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> -Affinity groups and themed residence halls that focus on the experience of individuals of a particular race but that are open to all students;
>
> -Courses and departments that focus on the experience of individuals of one race but that are open to students of all races.
>
> -Statements and policies by the school, school district, college or university that recognize, celebrate and highlight the value and importance of diversity and the need for action to ensure that individuals of different races are included and have access to opportunities.[4]

All of these actions, statements and policies are permissible and do not violate civil rights laws. The Department has no authority to threaten to withhold federal funding from states, school districts, colleges and universities who choose to exercise their rights to continue such protected speech and educational programming.

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may take that into account."); *id.* at 317 (Kavanaugh, J., concurring) (universities "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race") (quotations and citations omitted).

[4] *See, e.g., Ibanez v. Albermarle County Sch. Bd.*, 897 S.E.2d 300 (Va. App. 2024) (rejecting challenge to school district anti-racism policy based on concerns that by teaching about the existence of racial and religious distinctions the district had made and would continue to make "students feel 'uncomfortable,' 'confused and upset'" given that policy did not treat any students differently based on their race).

III. Far From Violating Federal Civil Rights Laws, Instruction, Curriculum and Programs that Recognize Racial Diversity Are Necessary to Secure Equal Educational Opportunity

What is more states, colleges and schools should continue their work to recognize and advance equal educational opportunity by ensuring that instruction, curriculum and programs recognize racial diversity and address the ways in which racism has limited instruction, educational curriculum, educational programming and opportunity.

An established body of research affirms what educators have long known: a culturally responsive and racially inclusive education benefits all students – and is the most effective pedagogical approach. *See* National Education Association & Law Firm Antiracism Alliance, *The Very Foundation of Good Citizenship: The Legal and Pedagogical Case for Culturally Responsive and Racially Inclusive Public Education for All Students* (2022), https://www.nea.org/sites/default/files/2022-09/lfaa-nea-white-paper.pdf. These studies show that students who participate in a curriculum that is culturally responsive and racially inclusive are more engaged, perform better academically, and graduate at higher rates. *Id.* at 9 (citing studies).

The educational mission of our nation's public schools is to instill in all students "the values on which our society rests," and to provide those students with the skills and knowledge necessary to realize their full potential. *Id.* at 14 (citing cases). Businesses and other stakeholders have recognized that diversity and cross-racial understanding are sources of strength and creativity in American society and in the workplace. *Id.* A culturally responsive and racially inclusive education facilitates these goals by preparing students for citizenship and voting, teaching cultural literacy, developing students' capacities for critical thinking and self-directed learning, and cultivating a workforce that can compete in the global marketplace. *Id.* at 7, 11, 14-15 (citing studies).

Additionally, dozens of research studies have established that a culturally responsive curriculum benefits *all* students. These studies have found an association between culturally inclusive education and enhanced student critical thinking skills, improved student GPA, increased school attendance, academic credits earned, improved student mathematics performance, improved standardized test performance, and increased graduation rates—associations that exist not just for Black, Indigenous, and People of Color ("BIPOC") students, but for *all* students. *Id.* at 14-15 (citing studies). By contrast, when educational materials or curricula fail to be inclusive and representative of students' backgrounds, their educational progress suffers. For these reasons, many states have acted to expand education on racism, sexism, the contributions of specific racial or ethnic groups to American history, and issues of equality and justice in public schools. *Id.* at 17-18.

Contrary to the Letter's assertions, a culturally responsive and racially inclusive education *is* consistent with federal law, including the Equal Protection Clause and Title VI. *Id.* at 18-22 (citing cases). Attempts to eliminate this pedagogical approach, by contrast, cannot find support in the history, values, or ideals enshrined in the U.S. Constitution or in Title VI. Rather, policies that prohibit a culturally responsive and racially inclusive education serve only to harm students and their communities by chilling discourse in classrooms on important topics such as race and promoting intolerance in the broader community. These prohibitions also raise serious First Amendment concerns and contradict the spirit and purpose of the Fourteenth Amendment. *Id.* at 27-33 (citing cases).

CONCLUSION

For all the reasons detailed above, the Department's Letter should be seen for what it is, a groundless threat to review initiatives at the K-12 and post-secondary level for compliance with a view of the law that is not sustainable. Efforts to teach inclusively and to ensure curriculum and school communities are representative of all students are lawful and beyond the reach of the Department to review and interfere with. Should you nevertheless learn that your school district or college or university is taking action to censor curriculum or curb programming based on the Dear Colleague Letter please let us know immediately by way of emailing us at AskOGC@nea.org.